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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/031,569	01/22/2002	Haruji Sawada	217865USOJPCT	6387
22850	7590	02/03/2005	EXAMINER	
OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.				LILLING, HERBERT J
1940 DUKE STREET				
ALEXANDRIA, VA 22314				ART UNIT
				PAPER NUMBER
				1651

DATE MAILED: 02/03/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/031,569	SAWADA ET AL.	
	Examiner	Art Unit	
	HERBERT J LILLING	1651	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 16 November 2004.
 2a) This action is **FINAL**. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-30 is/are pending in the application.
 4a) Of the above claim(s) 4-19 and 28-32 is/are withdrawn from consideration.
 5) Claim(s) _____ is/are allowed.
 6) Claim(s) 1-3 and 20-27 is/are rejected.
 7) Claim(s) _____ is/are objected to.
 8) Claim(s) 4-19 and 28-32 are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
 Paper No(s)/Mail Date _____.

4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date. _____.
 5) Notice of Informal Patent Application (PTO-152)
 6) Other: _____.

Art Unit: 1651

1. Receipt is acknowledged of the amendment filed November 16, 2004.
2. Claims 1-32 remain pending in this application.
3. Claims 1-3 and 20-27 drawn to the elected composition have been considered.

Claims 4-19 and 28-32 stand withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to nonelected inventions, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on June 25, 2004.

As stated in the previous office,

"Upon allowance of any of the composition claims, the method claims which includes process of making and/or process of using the compositions will be rejoined in accordance with the following:

F.P.: Ochiai/Brouwer Rejoinder form paragraph

The examiner has required restriction between product and process claims. Where applicant elects claims directed to the product, and a product claim is subsequently found allowable, withdrawn process claims that depend from or otherwise include all the limitations of the allowable product claim will be rejoined in accordance with the provisions of MPEP § 821.04. **Process claims that depend from or otherwise include all the limitations of the patentable product will be entered as a matter of right if the amendment is presented prior to final rejection or allowance, whichever is earlier.** Amendments

submitted after final rejections are governed by 37 CFR 1.116; amendments submitted after allowances are governed by 37 CFR 1.312.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103, and 112. Until an elected product claim is found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowed product claim will not be rejoined. See "Guidance on Treatment of Product and Process Claims in light of *In re Ochiai*, *In re Brouwer* and 35 U.S.C. § 103(b)," 1184 O.G. 86 (March 26, 1996). Additionally, in order to retain the right to rejoinder in accordance with the above policy, Applicant is advised that the process claims should be amended during prosecution either to maintain dependency on the product claims or to otherwise include the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder.**

Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the restriction requirement is withdrawn by the examiner before the patent issues. See MPEP § 804.01.

4. The rejection of claims 1, 3, 21, 23 and 24 under 35 U.S.C. 101 has been withdrawn in view of the amendment to the claims.

5. The rejections of claims 1-3 and 20-27 stand as stated in the previous office action:

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 1-3 and 21-24 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Muys et al, US 3,995,066, Nov 30, 1976.

The reference teaches compositions that contain the microorganism with food product compositions which compositions are considered to be within the scope of the claimed inventions. It is also considered that the amount of the yeast as disclosed in the examples would inherently lower the cholesterol absent a showing to the contrary.

Or

in the alternative, Claims 20 and 25-27 are rejected under 35 U.S.C. 103(a) as obvious over Muys et al, US 3,995,066.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The reference to Muys et al does not disclose the combination of species or the forms of the yeast. In view of the broad disclosure of the reference one of ordinary skilled in the art would have considered it was *prima facie* obvious to employ a combination of any the species would behave in the same manner absent unexpected or unobvious results. It is noted that the selection of the a combination of the specific two species would have been *prima facie* obvious in view of the disclosure on column 4, lines 5-6 in which *Kluyveromyces lactis* is the prime selected species and *Kluyveromyces marxianus* is the third preferred species. Both of which have been disclosed in the examples to be preferred and one of ordinary skilled in the art would have expected the same results absent unexpected or unobvious results for the claimed combination. Also, one would expect any form of the yeast would yield the same results in view of the disclosure in column 3, lines 21-25.

The arguments have been deemed not to be persuasive to overcome the reference which teaches that naturally occurring cheese inherently contain a composition that is within the scope of the claimed invention: Yeast containing food emulsions:

"The yeasts which are especially preferred are oxygen-consuming strains from yeasts naturally occurring in cheese, e.g. French types like Brie and Camembert, such as *Kluyveromyces lactis* and *Debaryomyces hansenii*."

In addition, the reference to Muys teaches in the examples of Table I compositions within the scope of the claimed inventions as well as in Table II that contains ex 17-18, 24-27 for *lactis* and example 14 for *marxianus*.

The composition of the reference is within the scope of claimed composition absent a showing that the reference composition is not within the scope of the claimed language. It is immaterial what the reference intended use of the same composition is concerned with as long as the composition is the same as alleged by this examiner. The elected claims are not drawn to methods of using the compositions or treating subjects.

Applicant is entitled to go to the Board of Appeals to overcome the above rejections.

6. **No claim is allowed.**

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to **Examiner Lilling whose telephone number is 571-272-0918** and **Fax Number** is (703) 872-9306 or SPE Michael Wityshyn whose telephone number is 571-272-0926. Examiner can be reached Monday-Thursday from about 5:30 A.M. to about 3:00 P.M. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

Information regarding the status of an application may be obtained from the Patent Application information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://portal.uspto.gov/external/portal/pair>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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Art Unit 1651
February 02, 2005

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